

## Environmental Protection Agency

## § 35.10005

of a national program award shall not exceed 75 percent of the approved work program costs provided the non-Federal share of such costs is provided from non-Federal sources.

### Subpart Q—Credit Assistance for Water Infrastructure Projects

SOURCE: 81 FR 91833, Dec. 19, 2016, unless otherwise noted.

#### § 35.10000 Purpose.

This part implements a Federal credit assistance program for water infrastructure projects.

#### § 35.10005 Definitions.

The following definitions apply to this part:

*Community water system* has the meaning given the term in section 1401 of the Safe Drinking Water Act (42 U.S.C. 300f).

*Credit assistance* means a secured loan or loan guarantee under 33 U.S.C. 3908.

*Credit agreement* means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that formalizes the terms and conditions established in the term sheet (or conditional term sheet) and authorizes the execution of a secured loan or loan guarantee.

*Credit subsidy cost* shall have the same meaning as “cost” under section 502(5) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)), which is the net present value at the time the obligation is entered into. The credit subsidy cost for a given project is calculated by EPA in consultation with OMB. The credit subsidy cost must be less than the unobligated subsidy amount that has been appropriated by Congress to date.

*Eligible project costs* mean amounts, substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of:

(1) Development-phase activities, including planning, feasibility analysis (including any related analysis necessary to carry out an eligible project), revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;

(2) Construction, reconstruction, rehabilitation, and replacement activities;

(3) The acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation (including acquisitions pursuant to section 5026(7)), construction contingencies, and acquisition of equipment; and

(4) Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction. Capitalized interest on the WIFIA credit instrument is not an eligible project cost.

*Federal credit instrument* means a secured loan or loan guarantee authorized to be made available under 33 U.S.C. 3901–3914 with respect to a project.

*Investment-grade rating* means a rating category of BBB minus, Baa3, bbb minus, BBB (low), or higher assigned by a nationally recognized statistical rating organization (NRSRO) to project obligations offered into the capital markets.

*Iron and steel products* means the following products made primarily of iron or steel: Lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

*Lender* means any non-Federal qualified institutional buyer (as defined in 17 CFR 230.144A(a)), known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), including:

(1) A qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986, 26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(2) A governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986, 26 U.S.C. 414(d)) that is a qualified institutional buyer.

*Loan guarantee* means any guarantee or other pledge by the Administrator to pay all or part of the principal of

and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

*Nationally recognized statistical rating organization (NRSRO)* means a credit rating agency identified and registered by the Office of Credit Ratings in the Securities and Exchange Commission under 15 U.S.C. 78o–7.

*Obligor* means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation; partnership; joint venture; trust; Federal, State, or local governmental entity, agency, or instrumentality; tribal government or consortium of tribal governments; or a State infrastructure finance authority.

*Project* means:

(1) One or more activities that are eligible for assistance under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)), notwithstanding the public ownership requirement under paragraph (1) of that subsection;

(2) One or more activities described in section 1452(a)(2) of the Safe Drinking Water Act (42 U.S.C. 300j–12(a)(2));

(3) A project for enhanced energy efficiency in the operation of a public water system or a publicly owned treatment works;

(4) A project for repair, rehabilitation, or replacement of a treatment works, community water system, or aging water distribution or waste collection facility (including a facility that serves a population or community of an Indian reservation).;

(5) A brackish or sea water desalination project, a managed aquifer recharge project, or a water recycling project;

(6) Acquisition of real property or an interest in real property—

(i) If the acquisition is integral to a project described in paragraphs (1) through (5) of this definition; or

(ii) Pursuant to an existing plan that, in the judgment of the Administrator, would mitigate the environmental impacts of water resources infrastructure projects otherwise eligible for assistance under this section;

(7) A combination of projects, each of which is eligible under paragraph (1) or (2) of this definition, for which a State

infrastructure financing authority submits to the Administrator a single application; or

(8) A combination of projects secured by a common security pledge, each of which is eligible under paragraph (1), (2), (3), (4), (5), or (6) of this definition, for which an eligible entity, or a combination of eligible entities, submits a single application.

*Project obligation* means any note, bond, debenture, or other debt obligation issued by an obligor in connection with the financing of a project, other than a Federal credit instrument.

*Project sponsor*, for the purposes of this part, means an applicant for WIFIA assistance or an obligor, as appropriate.

*Publicly sponsored* means the obligor can demonstrate, to the satisfaction of the Administrator, that it has consulted with the affected state, local, or tribal government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. Support can be shown by a certified letter signed by the approving municipal department or similar agency, mayor or other similar designated authority, local ordinance, or any other means by which local government approval can be evidenced.

*Secured loan* means a direct loan or other debt obligation issued by an obligor and funded by the Administrator in connection with the financing of a project under 33 U.S.C. 3908.

*State* means any one of the fifty states, the District of Columbia, Puerto Rico, or any other territory or possession of the United States.

*State infrastructure financing authority* means the State entity established or designated by the Governor of a State to receive a capitalization grant provided by, or otherwise carry out the requirements of, title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 *et seq.*) or section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12).

*Subsidy amount* means the dollar amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental

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effects on governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*).

*Substantial completion* means the stage in the progress of the project when the project or designated portion thereof is sufficiently complete in accordance with the contract documents so that the project or a portion thereof can be used for its intended use.

*Term sheet* means a contractual agreement between the EPA and the project sponsor (and the lender, if applicable) that sets forth the key business terms and conditions of a Federal credit instrument. Execution of this document represents a legal obligation of budget authority.

*Treatment works* has the meaning given the term in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292).

*WIFIA* means the Water Infrastructure Finance and Innovation Act of 2014, Pub. L. 113-121, 128 Stat. 1332, codified at 33 U.S.C. 3901-3914.

### §35.10010 Limitations on assistance.

(a) The total amount of credit assistance offered to any project under this part shall not exceed 49% of the anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis, or, if the secured loan does not receive an investment-grade rating, the total amount of credit assistance shall not exceed the amount of the senior project obligations of the project.

(b) Notwithstanding paragraph (a) of this section, the Administrator may offer credit assistance in excess of 49% of the anticipated eligible project costs as long as such excess assistance combined for all projects does not require greater than 25% of the subsidy amount made available for the fiscal year.

(1) Credit assistance may not exceed 80% of the total project costs due to a statutory restriction on the maximum extent of federal participation in a project, except in the case of certain rural water projects authorized to be carried out by the Secretary of the Interior that includes among its beneficiaries a federally recognized Indian tribe and for which the authorized Fed-

eral share of the total project costs is greater than 80%.

(2) Use of the authority to offer credit assistance in excess of 49% of the anticipated eligible project costs shall be considered only under extraordinarily exceptional circumstances.

(3) In the event this authority is used, all other criteria and requirements described in this part must be met and adhered to.

(c) Costs incurred, and the value of any integral in-kind contributions made, before receipt of credit assistance may be considered in calculating eligible project costs only upon approval of the Administrator. Such costs and integral in-kind contributions must be directly related to the development or execution of the project and must be eligible project costs as defined in §35.10005. In addition, such costs, excluding the value of any integral in-kind contributions, are payable from the proceeds of the WIFIA credit instrument and shall be considered incurred costs for purposes of paragraph (f) of this section. Capitalized interest on the WIFIA credit instrument is not eligible for calculating eligible project costs.

(d) No costs financed internally or with interim funding may be refinanced under this part later than a year following substantial completion of the project.

(e) The Administrator shall not obligate funds for a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*

(f) The Administrator shall fund a secured loan based on the project's financing needs. The credit agreement shall include the anticipated schedule for such loan disbursements. Actual disbursements will be based on incurred costs, and in accordance with the approved construction plan, as evidenced by paid invoices.

(g) The interest rate on a secured loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement as identified through use of the daily rate tables published by the Bureau of the

Fiscal Service for the State and Local Government Series (SLGS) investments. The yield on comparable Treasury securities will be estimated by adding one basis point to the SLGS daily rate with a maturity that is closest to the weighted average loan life of the WIFIA credit instrument, measured from first disbursement.

(h) The final maturity date of a secured loan will be the earlier of the date that is 35 years after the date of substantial completion of the project, as determined by the Administrator and identified in the assistance agreement, and if the useful life of the project, as determined by the Administrator, is less than 35 years, the useful life of the project; however, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed. In determining the useful life of the project, for the purposes of establishing the final maturity date of the WIFIA credit instrument, the Administrator will consider the useful economic life of the asset(s) being financed.

(i) A secured loan will not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor of the project.

(j) EPA will establish a repayment schedule for a secured loan based on the projected cash flow from project revenues and other repayment sources. Scheduled loan repayments of principal or interest on a secured loan will commence not later than 5 years after the date of substantial completion of the project as determined by the Administrator; however, scheduled loan repayments of principal or interest on a secured loan to a State infrastructure financing authority will commence not later than 5 years after the date on which amounts are first disbursed.

[81 FR 91833, Dec. 19, 2016, as amended at 83 FR 29694, June 26, 2018]

**§ 35.10015 Application process.**

(a) Each fiscal year for which budget authority is made available by Congress, the EPA shall publish a FEDERAL REGISTER notice to solicit letters of interest for credit assistance called a No-

tice of Funding Availability. Such notice will specify the relevant due dates, the estimated amount of funding available to support WIFIA credit instruments for the current and future fiscal years, contact name(s), and other details for submissions and funding approvals.

(b) Public and private applicants for credit assistance under this part will be required to submit letters of interest to the EPA in order to be selected by the Administrator to submit an application.

(c) The application process is divided into two steps: letter of interest and application.

(1) The letter of interest provides enough information for EPA to make a project selection and invite prospective borrowers to submit applications. Such information may include, but is not limited to:

- (i) Prospective borrower information;
- (ii) Project plan;
- (iii) Preliminary project operations and maintenance plan;
- (iv) Proposed financing plan and audited financial statements;
- (v) Contact information;
- (vi) Written responses addressing selection criteria;
- (vii) Certifications; and
- (viii) Notification of state infrastructure financing authority.

(2) The application provides all relevant information for EPA to provide credit assistance. Submission of an application does not guarantee that EPA will award credit assistance to a given applicant. At a minimum, such applications shall provide, in addition to the information provided in the letter of interest:

- (i) Detailed applicant information;
- (ii) Detailed project information;
- (iii) Detailed project operation and maintenance plan;
- (iv) Comprehensive financing plan; and
- (v) Complete certifications.

(d) Following successful submission and approval by EPA of the application, EPA will offer the applicant a term sheet, as described in section 35.10060. The applicant may accept or negotiate terms in the term sheet.

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(e) Following acceptance of the term sheet, the applicant will proceed to closing, as described in section 35.10065.

(f) An application for a project located in or sponsored by more than one entity shall be submitted to the EPA by just one entity. The sponsoring entities shall designate a single obligor for purposes of applying for, receiving, and repaying WIFIA credit assistance.

### § 35.10020 Small community set-aside.

(a) Each fiscal year for which budget authority is made available by Congress, EPA shall set aside at least 15% of budget authority for projects that serve communities of not more than 25,000 individuals.

(b) Any set-aside budget authority remaining unobligated on June 1 of the fiscal year for which the budget authority is set aside shall be made available for projects other than small community projects.

### § 35.10025 Federal requirements.

All projects receiving credit assistance under this part shall comply with:

(a) Environmental authorities:

(1) The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*;

(2) Archeological and Historic Preservation Act, 16 U.S.C. 469–469c;

(3) Clean Air Act, 42 U.S.C. 7401 *et seq.*;

(4) Clean Water Act, 33 U.S.C. 1251 *et seq.*;

(5) Coastal Barrier Resources Act, 16 U.S.C. 3501 *et seq.*;

(6) Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*;

(7) Endangered Species Act, 16 U.S.C. 1531 *et seq.*;

(8) Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12898, 59 FR 7629, February 16, 1994;

(9) Floodplain Management, Executive Order 11988, 42 FR 26951, May 24, 1977, as amended by Executive Order 13690, 80 FR 6425, February 4, 2015;

(10) Protection of Wetlands, Executive Order 11990, 42 FR 26961, May 25, 1977, as amended by Executive Order 12608, 52 FR 34617, September 14, 1987;

(11) Farmland Protection Policy Act, 7 U.S.C. 4201 *et seq.*;

(12) Fish and Wildlife Coordination Act, 16 U.S.C. 661–666c, as amended;

(13) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*;

(14) National Historic Preservation Act, 16 U.S.C. 470 *et seq.*;

(15) Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; and

(16) Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*

(b) Economic and miscellaneous authorities:

(1) Debarment and Suspension, Executive Order 12549, 51 FR 6370, February 21, 1986;

(2) Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301 *et seq.*, as amended, and Executive Order 12372, 47 FR 30959, July 16, 1982;

(3) Drug-Free Workplace Act, 41 U.S.C. 8101 *et seq.*;

(4) New Restrictions on Lobbying, 31 U.S.C. 1352;

(5) Prohibitions relating to violations of the Clean Water Act or Clean Air Act with respect to Federal contracts, grants, or loans under 42 U.S.C. 7606 and 33 U.S.C. 1368, and Executive Order 11738, 38 FR 25161, September 12, 1973; and

(6) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*

(c) Civil Rights, Nondiscrimination, Equal Employment Opportunity Authorities:

(1) Age Discrimination Act, 42 U.S.C. 6101 *et seq.*;

(2) Equal Employment Opportunity, Executive Order 11246, 30 FR 12319, September 28, 1965;

(3) Section 13 of the Clean Water Act, Pub. L. 92–500, codified in 42 U.S.C. 1251;

(4) Section 504 of the Rehabilitation Act, 29 U.S.C. 794, supplemented by Executive Orders 11914, 41 FR 17871, April 29, 1976 and 11250, 30 FR 13003, October 13, 1965;

(5) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; and

(6) Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements, 73 FR 15904.

(d) Other Federal and compliance requirements as may be applicable.

**§ 35.10026 Federal flood risk management standard.**

(a) In making WIFIA funding decisions under this rule, EPA will follow the requirements of Executive Orders 11988 and 13690, the Federal Flood Risk Management Standard, and the Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines). Applicants shall submit information regarding the project that is sufficient for EPA to determine that the project is in compliance with the standards and requirements of these Executive Orders and Guidelines.

(b) Projects funded under the WIFIA program implemented through this rule must also demonstrate that they will meet or exceed applicable State, local, Tribal, and Territorial standards for flood risk and floodplain management.

(c) As a condition of funding projects involving new construction, substantial improvement, or to address substantial damage to structures and facilities, the project sponsor must demonstrate to EPA that it will use the expanded floodplain standard described in E.O. 13690. Projects involving substantial improvement or addressing substantial damage include projects equaling or exceeding 50 percent of the value of the structure or facility. With regard to projects meeting this definition, the project applicant shall determine whether the proposed project will occur in the floodplain using any of the approaches provided in section 6(c) of Executive Order 11988, as amended. Applicants for proposed projects that are not new construction, substantial improvement, or projects to address substantial damage shall use at minimum, the base 100-year floodplain standard for actions that are not “critical actions” as defined in Executive Order 11988 Section 6(d) and the 0.2%-annual chance floodplain for critical actions.

(d) For purposes of this section, projects funded under WIFIA will be considered Critical Actions as defined in Executive Order 11988, as amended, unless the Administrator determines

and provides written notice to the applicant that the particular project is not considered to be a Critical Action.

(e) All applicants shall follow the Guidelines, including the Eight-Step Decision-Making Process described in the Guidelines, as a means of compliance with the requirements of section 2(a) of Executive Order 11988, as amended. EPA shall provide oversight to ensure that project applicants have complied with this process.

(f) The Administrator will not allow WIFIA funding for new construction, substantial improvement, or to address substantial damage to structures and facilities sited in or encroaching on a Floodway or a Coastal High Hazard Area/V-Zone, except for a functionally dependent use or to facilitate an open space use. The Administrator will make the determination of whether a proposed project is a functionally dependent use or a structure that facilitates an open space use. In addition to compliance with paragraphs (a) through (e) of this section, applicants for projects sited in these zones must include engineering plans demonstrating that the facility will be accessible and operational to the elevation of the applicable level, including elevation or floodproofing of buildings, electronics, and mechanical components.

**§ 35.10030 American iron and steel.**

(a) All projects receiving credit assistance under this part for the construction, alteration, maintenance, or repair of a project shall use only iron and steel products produced in the United States.

(b) By statute, at 33 U.S.C. 3914(b), “iron and steel products” means the following products made primarily of iron or steel: Lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials. Equipment employed in construction but does not become part of the project is not an “iron and steel product” for purpose of this section.

(c) EPA may issue a waiver for a case or category of cases where EPA finds:

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(1) That applying these requirements would be inconsistent with the public interest;

(2) Iron and steel products are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) Inclusion of iron and steel products produced in the US will increase the cost of the overall project by more than 25%.

(d) All guidance developed for compliance with American Iron and Steel requirements for EPA's State Revolving Fund programs shall apply to projects receiving credit assistance under this part. Such guidance can be found on EPA's Web site.

(e) All national waivers issued by EPA in accordance with section 436(b) of Pub. L. 113-76, 128 Stat. 346, 2014, Consolidated Appropriations Act, 2014, shall apply to projects receiving credit assistance under this part in the same manner as they apply to projects receiving assistance under the Clean Water and Drinking Water State Revolving Fund programs, unless such waiver addresses the timing of the submission of engineering plans and specifications as the submission relates to Congressional appropriations for either the Clean Water or Drinking Water State Revolving Fund programs.

### § 35.10035 Labor standards.

All laborers and mechanics employed by contractors or subcontractors on projects receiving credit assistance under this part shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor.

### § 35.10040 Investment-grade ratings.

(a) At the time a project sponsor submits an application, the EPA shall require a preliminary rating opinion letter. This letter is a conditional credit assessment from a NRSRO that provides a preliminary indication of the project's overall creditworthiness and that specifically addresses the potential of the project's senior debt obligations (those obligations having a lien senior to that of the WIFIA credit instrument on the pledged security) to

achieve an investment-grade rating and the default risk of the WIFIA loan.

(b) The full funding of a secured (direct) loan or loan guarantee shall be contingent on the assignment of an investment-grade rating by two NRSROs to all project obligations that have a lien senior to that of the Federal credit instrument on the pledged security along with commentary on the default risk of the WIFIA loan.

(c) Neither the preliminary rating opinion letter nor the formal credit ratings should reflect the effect of bond insurance, unless that insurance provides credit enhancement that secures the WIFIA obligation.

### § 35.10045 Threshold criteria.

(a) To be eligible to receive Federal credit assistance under this part, a project shall meet the following six threshold criteria:

(1) The project and obligor shall be creditworthy;

(2) The project sponsor shall submit a project application to the Administrator;

(3) A project shall have eligible project costs that are reasonably anticipated to equal or exceed \$20 million, or for a project eligible under paragraphs (2) or (3) of 33 U.S.C. 3905 serving a community of not more than 25,000 individuals, project costs that are reasonably anticipated to equal or exceed \$5 million;

(4) Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

(5) In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a tribal government or consortium of tribal governments, the project that the entity is undertaking shall be publicly sponsored.

(6) The applicant shall have developed an operations and maintenance plan that identifies adequate revenues

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to operate, maintain, and repair the project during its useful life.

(b) With respect to paragraph (a)(4) of this section, the Administrator may accept general obligation pledges or general corporate promissory pledges and will determine the acceptability of other pledges and forms of collateral as dedicated revenue sources on a case-by-case basis. The Administrator shall not accept a pledge of Federal funds, regardless of source, as security for the WIFIA credit instrument.

### § 35.10050 Use of existing financing mechanisms.

(a) Within 30 days of receipt of an application for a project eligible under 33 U.S.C. 3905(2) or (3), EPA shall notify the State infrastructure financing authority in the State in which the applicant's project is located that such an application has been received.

(b) EPA may not provide assistance under this chapter if within 60 days of receipt of a notification described in paragraph (a) of this section, the State infrastructure financing authority notifies EPA that it intends to commit funds in an amount equal to or greater than the amount requested in the application to the applicant for the project, as evidenced by an amendment to the State revolving fund program's intended use plan described in § 35.3150 or § 35.3555 unless:

(1) By the date 180 days after receipt of the notification described in paragraph (a) of this section, the State infrastructure financing authority fails to enter into an assistance agreement with the applicant; or

(2) The financial assistance to be provided by the State infrastructure authority will be at rates and terms that are less favorable than the rates and terms of the assistance agreement to be provided under this chapter.

### § 35.10055 Selection criteria.

(a) The Administrator shall assign weights to selection criteria in the first Notice of Funding Availability published in accordance with section 4(a), and adjusted weights in future Notices of Funding Availability to address changing circumstances and priorities. The following thirteen selection criteria will be used for evaluating

and selecting among eligible projects to receive credit assistance:

(1) The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public health benefits;

(2) The likelihood that assistance under this subtitle would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;

(3) The extent to which the project uses new or innovative approaches such as the use of energy efficient parts and systems, or the use of renewable or alternate sources of energy; green infrastructure; and the development of alternate sources of drinking water through desalination, aquifer recharge or water recycling;

(4) The extent to which the project protects against extreme weather events, such as floods or hurricanes, as well as the impacts of climate change;

(5) The extent to which the project helps maintain or protect the environment or public health;

(6) The extent to which a project serves regions with significant energy exploration, development, or production areas;

(7) The extent to which a project serves regions with significant water resource challenges, including the need to address water quality concerns in areas of regional, national, or international significance; water quantity concerns related to groundwater, surface water, or other resources; significant flood risk; water resource challenges identified in existing regional, state, or multistate agreements; and water resources with exceptional recreational value or ecological importance;

(8) The extent to which the project addresses identified municipal, state, or regional priorities;

(9) The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under this subtitle; and



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(10) The extent to which the project financing plan includes public or private financing in addition to assistance under this subtitle;

(11) The extent to which assistance under this subtitle reduces the contribution of Federal assistance to the project;

(12) The extent to which the project addresses needs for repair, rehabilitation or replacement of a treatment works, community water system, or aging water distribution or wastewater collection system; and

(13) The extent to which the project serves economically stressed communities, or pockets of economically stressed rate payers within otherwise non-economically stressed communities.

(b) The Administrator may include additional weighted criteria in the Notice of Funding Availability to address changing circumstances and priorities.

(c) In addition, 33 U.S.C. 3907(a)(1)(D)(i) conditions a project's approval for credit assistance on receipt of a preliminary rating opinion letter indicating that the project's senior debt obligations have the potential to attain an investment-grade rating.

### § 35.10060 Term sheets and approvals.

(a) EPA, after review and evaluation of the application, and all other required documents submitted by the applicant, may offer to an applicant a written Term Sheet signed by the Administrator, including detailed terms and conditions that must be met. The issuance of this Term Sheet represents approval of the application for credit assistance.

(b) To proceed to closing, the applicant must sign the Term Sheet before the expiration date on which the terms offered will expire unless the Administrator agrees in writing to extend the expiration date.

### § 35.10065 Closing on the credit agreement.

(a) Subsequent to the signing of the Term Sheet by the applicant, EPA will set a closing date for execution of a credit agreement, and provide documents articulating the conditions precedent to closing to the applicant.

(b) By the closing date, the applicant must have satisfied all of the detailed terms and conditions required by EPA and all other contractual, statutory, and regulatory requirements. If the applicant has not satisfied all such terms and conditions by the closing date, the Administrator may set a new closing date or rescind the approval of the application.

(c) If at any point following the issuance of the Term Sheet by EPA and prior to the closing date, the terms and conditions of the financing arrangements or the financial status of the obligor change in a material manner from the information used to evaluate the application, the applicant must notify EPA within the time period specified by the Administrator, at which point the Administrator may update the Term Sheet accordingly or rescind the approval of the application.

(d) The Credit Agreement and related documents will include detailed definitions, terms, and conditions necessary and appropriate to protect the interest of the United States over the life of the credit assistance and in the case of default, and will be executed at closing only after EPA has ensured that all requirements and conditions articulated in this rule, the statute, and other relevant laws and regulations have been satisfied.

### § 35.10070 Credit agreement.

(a) Only a credit agreement executed by the Administrator can contractually obligate EPA to provide assistance under WIFIA.

(b) EPA is not bound by oral representations made during the letter of interest step, or application step, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no Federal funds, proceeds of Federal loans, or proceeds of loans guaranteed by the Federal Government, may be used by a borrower to pay for credit subsidy costs, administrative fees, or other fees charged by or paid to EPA relating to the WIFIA program.

(d) Prior to the execution by EPA of a credit agreement, EPA must ensure that the following requirements and conditions are satisfied:

(1) The project qualifies as an eligible project under WIFIA;

(2) The face value of the credit agreement is limited to no more than 49 percent of total eligible project costs, or if credit assistance in excess of 49% has been approved, no more than the percentage of eligible project costs agreed upon, not to exceed 80% of eligible project costs;

(3) The applicant is obligated to make full repayment of the principal and interest on the credit instrument over a period of up to the lesser of 35 years or the useful life of the project, after substantial completion; however, the final maturity date of a secured loan to a State infrastructure financing authority will be not later than 35 years after the date on which amounts are first disbursed.

(4) If the credit instrument is a loan guarantee, the loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(5) The amount of the credit agreement, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(6) The applicant has pledged project assets and other collateral or surety, including non-project-related assets, determined by EPA to be necessary to secure the repayment of the credit agreement;

(7) The credit agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default;

(8) The credit agreement is not subordinate to any loan or other debt obligation in the event of bankruptcy, insolvency, or liquidation of the obligor of the project;

(9) There is satisfactory evidence that the applicant is willing, competent, and capable of performing the terms and conditions of the credit agreement, and will diligently pursue the project;

(10) The applicant has taken and is obligated to continue to take those actions necessary to perfect and main-

tain liens on assets which are pledged as security for the credit agreement;

(11) EPA or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(12) EPA and the applicant have reached an agreement as to the information that will be made available to EPA and the information that will be made publicly available;

(13) The applicant has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;

(14) The applicant has no delinquent federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;

(15) The credit agreement and related agreements contain such other terms and conditions as EPA deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the credit agreement, and (ii) such collateral sharing, priorities and voting rights among creditors and other intercreditor arrangements as, in each case, EPA deems reasonable and necessary to protect the interests of the United States; and

(e) The credit agreement must contain audit provisions which provide, in substance, as follows:

(1) The applicant must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project; and

(2) EPA and the Inspector General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the applicant. Examination of records may be made during the regular business hours of the applicant, or at any other time mutually convenient.

**§ 35.10075 Reporting requirements.**

At a minimum, any recipient of Federal credit assistance under this part shall submit an annual project performance report and audited financial statements to EPA within no more than 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. EPA may conduct periodic financial and compliance audits of the recipient of credit assistance, as determined necessary by EPA. The specific credit agreement between the recipient of credit assistance and EPA may contain additional reporting requirements.

**§ 35.10080 Fees.**

(a) *Application fee.* EPA will require a non-refundable application fee for each project applying for credit assistance under the WIFIA program. An application fee will be due upon submission of the complete application. For applications for projects serving small communities (population of not more than 25,000 people), this application fee will be \$25,000. For all other applications, this application fee will be \$100,000. The initial application fee will be credited to the credit processing fee required under paragraph (c) of this section.

(b) *Adjustment of application fee.* For each application and approval cycle, EPA may adjust the amount of the application fee described in paragraph (a) of this section based on program implementation experience and cost expectations. EPA will publish this amount in each FEDERAL REGISTER solicitation for letters of interest.

(c) *Credit processing fee.* Except as otherwise provided in paragraph (f) of this section, EPA will require an additional credit processing fee for projects selected to receive WIFIA assistance upon closing, or in the event that the project does not proceed to closing, *e.g.*, if the application is withdrawn or denied. The proceeds of any such fees will be used to pay the remaining portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal services, in the field of municipal and project finance, to assist in the underwriting of

the Federal credit instrument. All of, or a portion of, this fee may be waived.

(d) *Servicing fee.* EPA will require borrowers to pay a servicing fee for each credit instrument approved for funding. Separate fees may apply for each type of credit instrument (*e.g.*, a loan guarantee, a secured loan with a single disbursement, or a secured loan with multiple disbursements), depending on the costs of servicing the credit instrument as determined by the Administrator. Such fees will be set at a level sufficient to enable the EPA to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments.

(e) *Optional supplemental fee.* If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under WIFIA, EPA and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. No such fee may be included among eligible project costs.

(f) *Reduced fees.* To the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs, EPA may utilize such appropriated funds to reduce fees that would otherwise be charged under paragraph (c) of this section.

(g) *Extraordinary expenses.* EPA may require payment in full by the borrower of additional fees, in an amount determined by EPA, and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower, in the event that a borrower experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.*, engineering failure or financial work-outs) which require EPA to incur time or expenses beyond standard monitoring.

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